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Supreme Court, U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 73-1808.

JAMES BURNETT McKAY LAING,
PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA ET AL.,
DEFENDANTS-APPELLEES.

Appendix.

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Supreme Court of the United States.

October Term, 1974.

No. 73-1808.

JAMES BURNETT McKAY LAING,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA et al.,
Defendants-Appellees.

Appendix.

Appendix A.

UNITED STATES DISTRICT COURT.
DISTRICT OF VERMONT.

Civil No. 6661.

James Burnett McKay Laing
v.
United States of America et al.

Relevant Docket Entries.

	1972			
1	July	15	Filed Complaint. Issued Summons and delivered same to Marshal for service.
2		15	Filed Plaintiff's Motion for Hearing on Preliminary Injunction.
3		20	Filed Motion to issue Order to Show Cause; Motion to Advance Answer; and Certificate of Service.
4		24	Filed Summons; return served.
5		26	Filed Motion to Place Plaintiff's Property in Interest-Bearing Account; and Certificate of Service.
6	Aug.	3	Filed Defendants' Opposition to Motion to Advance Answer; Opposition to Place Plaintiff's Property in Interest-bearing Account; Response to Motion to Issue Order to Show Cause and Certificate of Service.
7		4	Filed Notice of Deposition of James Perry; and Certificate of Service.
8		21	Filed Defendants' Motion for a Protective Order, Memorandum in support of Motion for Protective Order and Certificate of Service.
9		21	Filed Plaintiff's Notice of taking Deposition of Fulton D. Fields.
10		25	Filed Plaintiff's Memorandum in opposition to Motion for a Protective Order and Certificate of Service.
11	Sept.	18	Filed Defendants' Motion to Dismiss or in the alternative for Summary Judgment and Certificate of Service.

12	Oct.	18	Filed Plaintiff's Motion for Hearing.
13		18	Filed Plaintiff's Memorandum in opposition to Motion to Dismiss.
14		19	Filed Affidavit of Fulton D. Fields.
15		19	Filed Affidavit of James Perry.
16		20	Filed Plaintiff's Motion to dismiss levy.
		24	In Court before Judge Coffrin. Duncan Kilmartin, Esq., and Martin Weinberg, Esq., for Plaintiff. Norman Cohen, Ass't. U. S. Attorney and John Mullenholz, Esq. for Government.
		24	Hearing on Motion to place Plaintiff's property in interest-bearing account.
		24	Statements made to Court by Mr. Weinberg, followed by Mr. Mullenholz who objects to Motion.
		24	Further statements made to Court by Mr. Weinberg.
		24	Decision reserved.
		24	Hearing on Defendants' Motion to Dismiss or in the alternative for Summary Judgment.
		24	Statements made to Court by Mr. Mullenholz in support of his Motion to Dismiss, objected to by Mr. Weinberg.
		24	Government to file a further memorandum in reply to Mr. Weinberg's memorandum.
		24	ORDERED: Government to submit supplemental memorandum by November 3, 1972, and Plaintiff has until November 10, 1972, to file reply memorandum.
		24	Hearing on Defendants' Motion for Protective Order.

		24	Statements made to Court by Mr. Mullenholz in support of his Motion followed by Mr. Weinberg.
		24	Court limits examination of witnesses to affidavits.
		24	The following witnesses, sworn by Clerk, were cross-examined by Mr. Weinberg: Fulton D. Fields and James R. Perry.
		24	ORDERED: Government to furnish Court to cite procedures in this situation, statute and theory of the case by November 3, 1972; Plaintiff to reply by November 10, 1972.
17		29	Filed Plaintiff's Motion to Amend Complaint.
18	Nov.	13	Filed Plaintiff's letter re Rule 15a.
19	Dec.	4	Filed Government's supplementary memorandum in support of motion to dismiss or in the alternative for summary judgment.
20		11	Filed Plaintiff's Supplementary memorandum in opposition to Motion to dismiss and motion for summary judgment and in support of preliminary injunction.
21		26	Filed Defendants' response to Plaintiff's supplementary memorandum.
	1973		
22	Jan.	22	Filed Plaintiff's motion for return of property.
23	Feb.	7	Filed defendants opposition to motion for return of property.
24	May	16	Filed supplementary memorandum of law in opposition to defendant's motion to dismiss or motion for summary judgment.

	Aug.	1	In open Court before Judge Coffrin; Duncan Kilmartin, Esq. and Martin Weinberg, Esq. for Plaintiff; John Hines, Esq. for Defendants.
		1	Upon consideration of Plaintiff's motion to amend Complaint, it is
		1	ORDERED: Motion granted.
		1	Continued hearing on defendants' motion to dismiss or in the alternative, for summary judgment; and hearing on plaintiff's motion for return of property.
		1	Statements made to Court by Mr. Hines, followed by Mr. Weinberg.
		1	All Motions taken under advisement.
25	Sept.	12	Filed Opinion and Order—Government's Motion to dismiss granted. The Court points out that this decision does not foreclose plaintiff's opportunity for redress in subsequent proceedings presented to the court in a proper jurisdictional and procedural posture. Mailed copy to Attorneys.
26		12	Filed Judgment on Decision by the Court—It is Ordered and Adjudged that Government's Motion to Dismiss granted. The Court points out that this decision does not foreclose plaintiff's opportunity for redress in subsequent proceedings presented to the Court in a proper jurisdictional and procedural posture. Mailed copy to Attys.
27		25	Filed Pltf's. Notice of Appeal. Mailed copy to Crane, Inker & Oteri, Esq., Duncan Kilmartin, Esq., U. S. Attorney and John P. Hines, Esq.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Case No. 73-2537.

James Burnett McKay Laing

v.

United States of America et al.

1973		
Sept.	26	Filed copies of docket entries and notice of appeal.
Oct.	16	Action Docketed.
Oct.	16	Received docket fee.
	19	Dep. acct. 100869 (4702) CD #60.
Nov.	5	Filed record (Original papers of district court).
	16	Filed designation of parts to be included in the appendix.
	16	Filed notice of appearance.
Dec.	17	Filed brief, appellant, with proof of service —by mail.
	17	Filed appendix, appellant, (Vol. I & II) with proof of service—by mail.
1974		
Jan.	2	Filed motion for leave to file a supplementary brief, appellant with proof of service.
	7	Filed order granting motion for leave to file a supplementary brief, appellant. The brief shall be served and filed not later than 1-21-74. Appellees shall answer not later than 2-15-74.
	22	Filed supplementary brief, appellant with proof of service—by mail.

Feb.	21	Filed brief, appellee, with proof of service—by mail.
	21	Filed notice of appearance.
Apr.	3	Filed motion for leave to hear argument of appeal en banc with proof of service.
	5	Filed order denying motion to hear argument of the appeal en banc.
	8	Argument heard: by Friendly, Timbers, CJJ & Thomsen, DJ.
	8	Filed 4 copies of U.S. Court of Appeals, 6th Circuit opinion.
May	2	Filed judgment.
	2	Judgment affirmed, Per Curiam.
	17	Filed itemized and verified bill of costs with proof of service—by mail.
June	10	Filed notice of filing of petition for writ of certiorari (SC #73-1808).
	26	Filed statement of costs.
	26	Issued mandate (opinion, judgment, and statement of costs).
Oct.	24	Filed certified copy of notice of granting of petition for a writ of certiorari and the case is set for oral argument in tandem with No. 74-75. (#73-1808)
Dec.	5	Certified original record and proceedings for Supreme Court Clerk.
1974		
Oct.	15	Order of Supreme Court allowing certiorari.

Complaint.

[Filed July 15, 1972.]

1. This is an action for injunctive relief and a declaratory judgment. The action seeks to restrain the enforce-

ment, operation, and execution of those levy powers of 26 USCA, § 6331(a) which are pursuant to a finding of jeopardy and to restrain the continued possession of plaintiff's property by the above-named defendants. A copy of 26 USCA, § 6331(a) is attached hereto and marked Exhibit "A." This action also seeks, in the alternative, a declaratory judgment that the jeopardy provision of 26 USCA, § 6331(a) is unconstitutional both on its face and as applied to the plaintiff in that it deprives plaintiff of his property without due process of law and in violation of the Fifth Amendment to the United States Constitution and it unconstitutionally restricts his right of travel. This action is brought under the Fifth Amendment of the United States Constitution and under 26 USCA, § 7421, 26 USCA, § 6213(a). 26 USCA, § 6861 and 26 USCA, § 6331(a). The matter in controversy exceeds $10,000 exclusive of costs and interests. Jurisdiction of the court is asserted under 28 USCA, § 1346(a)(1), 28 USCA, § 1331, 28 USCA, § 1332, 28 USCA, § 2201 and 2202, 28 USCA § 1361, and 28 USCA, § 1356.

2. Your plaintiff, James Burnett McKay Laing, is a citizen of New Zealand.

3. Your defendant, John M. Walters, is the Commissioner of the Internal Revenue Service.

4. Your defendant, Fulton D. Fields, is District Director of the Internal Revenue Service, District of Vermont.

5. Your defendant, James R. Perry, is Chief of the Collection Division, Internal Revenue Service, District of Vermont.

6. On or about May 31, 1972, the plaintiff entered the United States from Canada on a B-2 Visa.

7. On June 24, 1972, twenty-five days after entering the United States, the plaintiff departed the United States for Canada. His passengers were not permitted to enter Canada. The plaintiff did not enter Canada. He turned around

to return to the United States. The plaintiff's vehicle was stopped and searched by United States Customs upon reentering the United States. A suitcase with approximately $300,000 in United States currency was seized from him.

8. The plaintiff was informed that the money was being detained by the Internal Revenue Service.

9. No assessment was made *before* the property of plaintiff was levied upon.

10. No request was made for Mr. Laing to fill out a tax return *before* the property of plaintiff was levied upon.

11. No deficiency was determined *before* the property of plaintiff was levied upon.

12. No finding of jeopardy was made *before* the property of plaintiff was levied upon.

13. No notice or demand for the payment of a tax was served or communicated to plaintiff *before* the property of plaintiff was levied upon.

14. The procedural prerequisites of a levy and the procedural prerequisites of a finding of tax liability were not made before the property of Mr. Laing was levied upon.

15. The defendants have a statutory obligation to pursue the procedural prerequisites to a seizure of money and in the absence of such a conformity to the statute, the levy must be extinguished.

16. The plaintiff is a non-resident alien who was in the United States for less than one month.

17. The money is in no way connected with the conduct of any trade or business in the United States nor is it derived from any source within the United States; rather the money was brought into the United States for potential investments which did not materialize.

18. Inasmuch as the termination of taxable year provisions of 26 USCA, § 6851 were followed, there was still no provision for a levy until the formal and omitted procedures in numbers of 8 through 12 of this Complaint were followed.

19. Any levy occurring before the procedures are followed is in gross violation of the Fifth Amendment of the United States, and defendants, as United States Officers, have an obligation to return to Mr. Laing his possessions.

20. Regardless of the procedures, any levy upon the possessions of Mr. Laing is in violation of the Fifth Amendment of the United States Constitution unless some factual evidence is discovered by the Internal Revenue Service linking Mr. Laing's possessions with the standards for taxable income. In the absence of such evidence, they levy would deprive Mr. Laing of his property without due process. To the extent 26 USCA, § 1331(a) and 26 USCA, § 6861 permit a speculative determination of liability, they are unconstitutional. Furthermore, the provisions of 26 USCA, § 6331(a) are an unconstitutional interference with plaintiff's right to travel.

21. The plaintiff has been depossessed of approximately $300,000. He is being threatened with immediate, serious, irreparable, and clear harm due to this depossession. Plaintiff is faced with grave and imminent shortages of finances, with a costly interference with his business opportunities, with an immediate exhaustion of his resources upon which he depends to maintain a decent standard of living, with a frightening prospect of imminent problems in obtaining sufficient resources for necessities such as food and housing, and with a daily diminution of his property due to the impossibility of making investments while his assets are possessed by the Internal Revenue Service.

22. The Government cannot possibly succeed in maintaining the levy at any proceeding because:

(a) The Internal Revenue Service has levied upon plaintiff's property in violation of its own statutes, 26 USCA, § 6331(a), 26 USCA, § 6861(a), 26 USCA, § 6851, and in violation of the Fifth Amendment of the United States Constitution.

(b) The Internal Revenue Service has failed to make an assessment of deficiency as a prerequisite to the levy.

(c) The Internal Revenue Service has failed to take the proper formal steps to determine that plaintiff was a person "liable to pay any tax" under 26 USCA, § 6331(a).

(d) The Internal Revenue Service has failed to make a formal finding of jeopardy and has failed to give notice or demand for the payment of the tax, as prescribed by 26 USCA, § 6331(a).

(e) The Internal Revenue Service has failed to use any standards in its assessment of deficiency; in specific, upon the complete absence of any evidence linking the property of plaintiff with any tax liability, the seizure of the property and the levy upon it is a deprivation of property, without due process of law and as such is in violation of the Fifth Amendment of the United States Constitution. Thus, under the *Enochs v. Williams Packing and Navigation* case, 370 US 1, jurisdiction lies for unjunctive relief.

WHEREFORE, your petitioner prays that:

1. That a preliminary injunction be issued ordering that the defendants, their agents, and their successors be enjoined from continuing to possess any and all property of the plaintiff;

2. That a permanent injunction issue requiring defendants, their agents, and their successors to not seize the property of the plaintiff unless they following [*sic.*] the proper procedures which must precede any jeopardy levy under 26 USCA, § 6331(a), namely:

(a) An assessment;

(b) A determination of deficiency based on tax re-

turns, and on some evidence linking the plaintiff's property with taxable income;

(c) A formal finding of jeopardy;

(d) Notice and demand.

3. That the part of 26 USCA, § 6331(a) which permits a levy to be placed on property without explicitly requiring some finding based on evidence that tax liability does in fact exist be declared unconstitutional and in violation of the due process clause of the Fifth Amendment of the United States Constitution; and

4. All other relief as the Court may deem proper.

By his Attorneys,

CRANE, INKER & OTERI,
By JOSEPH S. OTERI,
By MARTIN G. WEINBERG.

Local Counsel: Duncan Kilmartin, Esq.
Rexford and Kilmartin
22 Third Street
Newport, Vermont 05855

Motion for Hearing on Preliminary Injunction.

[Filed July 15, 1972.]

Now comes the plaintiff and moves that a hearing be ordered by this Honorable Court, preferably during the week of July 24, 1972, and if not then as soon afterwards as is possible. The reason for the expedited hearing is that the plaintiff is suffering irreparable harm because of the unlawful seizure of his property.

By his Attorneys,

CRANE, INKER & OTERI,
By MARTIN G. WEINBERG.

Notice of Deposition.

[Filed August 4, 1972.]

To: James R. Perry
Assistant Chief
Collection and Taxpayer Service Division
Internal Revenue Service
P.O. Box 9087
J.F K. Post Office
Boston, Massachusetts 02203

Please take notice that pursuant to Rule 30(a) and Rule 30(b)(1) of the Federal Rules of Civil Procedure, the plaintiff in the above-entitled matter will take the deposition of James Perry before a notary public or other officer authorized by law to administer oaths commencing at 10:00 A.M. on Friday, August 25, 1972, at the offices of Crane, Inker & Oteri, Fourth Floor, 20 Ashburton Place, Boston, Massachusetts.

CRANE, INKER & OTERI,
By MARTIN G. WEINBERG,
Attorney for Plaintiff.

Notice of Deposition.

[Filed August 21, 1972.]

To: Fulton D. Fields
District Director of Internal
Revenue Service
Federal Building
Burlington, Vermont

Please take notice that pursuant to Rule 30(a) and Rule 30(b)(1) of the Federal Rules of Civil Procedure, the plaintiff in the above-entitled matter will take the deposition of

Fulton D. Fields before a notary public or other officer authorized by law to administer oaths commencing at 2:00 P.M. on Tuesday, August 29, 1972, at the offices of Crane, Inker & Oteri, Fourth Floor, 20 Ashburton Place, Boston, Massachusetts.

CRANE, INKER & OTERI,
By MARTIN G. WEINBERG,
Attorney for Plaintiff.

Motion for a Protective Order.

[Filed August 21, 1972.]

The defendants by their attorney, George W. F. Cook, Esq., United States Attorney for the District of Vermont, move this Court pursuant to Federal Rule of Civil Procedure 26(c) for a protective order directing that discovery not be had by the plaintiff in this action on the ground that this Court does not have jurisdiction to entertain this action as more fully set forth in the memorandum in support of this motion which is attached hereto and incorporated herein.

GEORGE W. F. COOK,
United States Attorney,
By NORMAN COHEN,
Assistant United States Attorney.

JOHN MULLENHOLZ,
Trial Attorney, Tax Division,
Department of Justice,
Washington, D.C. 20530.

Motion to Dismiss
or in the Alternative
for Summary Judgment.

[Filed September 18, 1972.]

The defendants, by their attorney, George W. F. Cook, United States Attorney for the District of Vermont move this Court pursuant to Rule 12 of the Federal Rules of Civil Procedure for an order dismissing this action on the following grounds:

1. This Court lacks authority to grant the relief requested because the provisions of 28 United States Code, Section 2201 forbid the granting of declaratory relief with respect to federal taxes.

2. Under the provisions of Section 7421(a) of Title 26 United States Code, this Court lacks jurisdiction to enjoin the collection of federal taxes.

3. This Court does not have jurisdiction over the defendants inasmuch as the suit is, in fact, one against the United States of America and as such is barred by sovereign immunity.

In the alternative the defendants move this Court for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law.

In support of this motion, there is a memorandum of law attached hereto.

GEORGE W. F. COOK,
United States Attorney,
By JOHN MULLENHOLZ,
Trial Attorney,
Tax Division
Washington, D. C.
202-739-3037

Affidavit of Fulton Fields.

[Filed October 19, 1972.]

FULTON FIELDS, being duly sworn, deposes and says:

1. That I am employed by the Internal Revenue Service of the United States as District Director of Internal Revenue for Burlington, Vermont, and that I was so employed on June 24, 1972.

2. That early on the morning of June 24, 1972, I was advised by an agent of the Bureau of Customs in Derby Line, Vermont, that James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed were detained at the United States border at Derby Line, Vermont, after being refused entry into Canada, in possession of United States coin and currency in excess of $300,000, the majority of which was found in the engine compartment of the automobile in which these three individuals were riding.

3. That upon receiving the information set forth in paragraph 2 of this affidavit. I found that James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed were in the process of placing their assets beyond the reach of the Government by concealing and removing the assets from the United States thereby tending to prejudice or render ineffectual collection of income tax and I determined that the taxable years of James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed should be terminated and that immediate efforts should be made to collect their tax liabilities.

4. That upon making the determination described in paragraph 3 of this affidavit, I contacted, by telephone, Joseph O'Kane, Chief of the Intelligence Division, Internal Revenue Service, Burlington, Vermont, and related the information set forth in paragraph 2 of this affidavit and requested that he, together with James Perry, who was at

that time Chief of the Collection and Taxpayer Service Division, Internal Revenue Service, Burlington, Vermont, proceed to Derby Line, Vermont, and take whatever steps necessary to collect the tax liabilities of James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed.

FULTON FIELDS,
District Director,
Internal Revenue Service,
Boston, Massachusetts.

Affidavit of James Perry.

[Filed October 19, 1972.]

JAMES PERRY, being duly sworn, deposes and says:

1. That I am Assistant Chief of the Collection and Taxpayer Service Division, Internal Revenue Service, of the Office of the District Director of Internal Revenue for Boston, Massachusetts.

2. That on June 24. 1972, I was Chief of the Collection and Taxpayer Service Division, Internal Revenue Service, of the Office of the District Director of Internal Revenue for Burlington, Vermont.

3. That on June 24, 1972, I was advised by Joseph O'Kane, Chief of the Intelligence Division, Internal Revenue Service, Burlington, Vermont, that James Burnett McKay Laing, Larry Robert Kleinhans, and Nancy Armistene Reed were detained at the United States border in Derby Line, Vermont, in possession of a large amount of United States currency and that Fulton Fields, District Director of Internal Revenue, Burlington, Vermont. had directed that all necessary steps be taken to collect the tax liabilities of those three individuals.

4. That upon receiving this information I proceeded with Joseph O'Kane to Derby Line, Vermont, where I interviewed James Burnett McKay Laing, Larry Robert Kleinhans, and Nancy Armistene Reed. The interview began at approximately 10:00 a.m. on Saturday, June 24, 1972.

5. That upon completing the interview described in paragraph 4 of this affidavit, I gave notice to James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed that in view of their attempt to place their assets beyond the reach of the Government by concealing and removing the assets from the United States thereby tending to prejudice or render ineffectual collection of income tax, their taxable years had been terminated and I demanded immediate payment of their tax liabilities in the amount of $310,000 for each individual.

6. That upon the refusal of James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed to make payment of their tax liabilities described in paragraph 5 of this affidavit, I contacted the Andover Service Center in Andover, Massachusetts, and requested that assessments be made against James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed in the amount of $310,000, as to each individual for the taxable period January 1, 1972, through June 24, 1972.

7. That after 12 noon on June 24, 1972, I was advised, telephonically, by a representative of the Andover Service Center in Andover, Massachusetts, that assessments had been made against each of the three individuals, James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed in the amount of $310,000 for the period January 1, 1972, through June 24, 1972.

8. That upon receiving the information described in paragraph 7 of this affidavit, I gave James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed

notice of the assessments and demanded payment of the assessments.

9. That James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed refused to make payment of the assessments described in paragraph 7 of this affidavit and upon their refusal to make payment of the assessments the sum of $306,896.50 was seized and applied to the tax liabilities of James Burnett McKay Laing, Larry Robert Kleinhans and Nancy Armistene Reed.

JAMES PERRY,
Assistant Chief,
Collection and Taxpayer
Service Division.

Plaintiff's Motion to Amend Complaint.

[Filed October 29, 1972.]

Now comes the plaintiff in the above-captioned matter and moves that this Honorable Court permit him, under that part of Rule 15 of the Federal Rules of Civil Procedure which permits amendments as a matter of course prior to the service of responsive pleading, to amend his complaint by adding the following:

20(a) Plaintiff or his attorney have not received the required written notice within sixty (60) days of the assessment and levy as mandated by 26 USCA 6861(b), 26 USCA 6212(a); and in the absence of such notice the plaintiff is entitled to a return of his seized assets;

WHEREFORE:

2(a) A preliminary and permanent injunction issue against defendant due to its failure to send the required statutory notice within sixty (60) days of the making of the jeopardy assessment.

3(a) That the actions of the Internal Revenue Service which constituted a seizure and maintenance of plaintiff's money without any finding of a substantial or probable nexus between that money and taxable income should be enjoined as a violation of the Due Process Clause of the United States Constitution and the plaintiff's assets should be returned to him until such a probable nexus is established.

By his attorneys,
CRANE, INKER & OTERI,
By MARTIN G. WEINBERG.

Motion for Return of Property.

[Filed January 22, 1973.]

Now comes the plaintiff and moves that this Honorable Court order the defendants to return any and all monies seized from plaintiff which exceed the amount of his assessment.

CRANE, INKER & OTERI,
By MARTIN G. WEINBERG.

Opposition to Motion for Return of Property.

[Filed February 7, 1973.]

The defendants oppose the motion of the plaintiff for return of property on the grounds that this Court lacks jurisdiction over this action and, assuming *arguendo* that this Court had jurisdiction to return the property in question, the plaintiff has wholly failed to present any evidence to the Court in support of his contentions as contained in the complaint.

In support of this opposition, the defendants rely upon the several memoranda submitted in support of their motion to dismiss.

GEORGE W. F. COOK,
United States Attorney,
By JOHN MULLENHOLZ,
Trial Attorney, Tax Division,
Department of Justice,
Washington, D.C. 20530,
Telephone: 202-239-3037.

Judgment on Decision by the Court.

[Filed September 12, 1973.]

This action came on for trial (hearing) before the Court, Honorable Albert W. Coffrin, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged Government's Motion to Dismiss granted. The Court points out that this decision does not foreclose plaintiff's opportunity for redress in subsequent proceedings presented to the Court in a proper jurisdictional and procedural posture.

Notice of Appeal.

[Filed September 25, 1973.]

Notice is hereby given that James Burnett McKay Laing, plaintiff in the above-entitled action, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of Honorable Albert W. Coffrin granting Government's Motion to Dismiss entered in this action on the 12th day of September, 1973.

By his attorneys,

CRANE, INKER & OTERI,

By MARTIN G. WEINBERG.

SUPREME COURT OF THE UNITED STATES

No. 73-1808

JAMES BURNETT McKAY LAING,
PETITIONER,
v.
UNITED STATES ET AL.

ORDER ALLOWING CERTIORARI. Filed October 15, 1974.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is set for oral argument in tandem with No. 74-75.

Exhibit A.

DEPARTMENT OF THE TREASURY

INTERNAL REVENUE SERVICE

June 29, 1972 AU:R

James Burnett MacKay Laing
173 Cedar Wood Drive
Brattleboro, Vermont 05301

CERTIFIED MAIL

Dear Mr. Laing:

Pursuant to section 6851 of the Internal Revenue Code, you are notified that I have found you were in the process of placing your assets beyond the reach of the Government by concealing and removing the assets from the United States thereby tending to prejudice or render ineffectual collection of income tax for the period January 1, 1972 to June 24, 1972. Accordingly, I have declared the taxable period of January 1, 1972 to June 24, 1972 terminated; and, consequently, the income tax for the terminated period has become immediately due and payable.

Demand is hereby made for the tax for the terminated period in the following amount:

Taxable Period	*Tax*
1/1/72 to 6/24/72	$195,985.55

Any portion of the tax for the terminated period which is unpaid shall be assessed against you, and administrative or judicial action to collect the assessment shall be taken immediately.

Under section 443 of the Internal Revenue Code you are required to file a return for your terminated taxable period.

Such termination and filing does not relieve you of the responsibility for filing a return for your usual annual accounting period under section 6012 of the Code. Any amount collected as a result of termination of the period will be applied against any assessment which may be made for the terminated period and credited against the tax finally determined to be due on your annual return.

Very truly yours,
[Illegible.]
District Director
Acting

Appendix B.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JAMES BURNETT McKAY LAING
v.
UNITED STATES OF AMERICA ET AL.

Civ. A. No. 6661

[364 F. Supp. 469 (D. Vt. 1973)]

Opinion and Order

COFFRIN, District Judge.

On July 15, 1972 plaintiff filed an action seeking an injunction against the continued possession by the Internal Revenue Service (IRS) of money allegedly belonging to him and a declaratory judgment that the provisions of the Internal Revenue Code under which the assessment and levy on his property were made were unconstitutional. A flurry of motions to accelerate the course of this proceeding were filed shortly after the complaint and plaintiff attempted to depose various federal officials which the Government vigorously opposed. On September 18, 1972 the IRS filed a motion to dismiss or in the alternative for summary judgment. Hearings were held on the various motions on October 24, 1972 and July 31, 1973. Taking the facts in the light most favorable to the plaintiff and from the affidavits filed by the Government which plaintiff concedes are accurate as far as they go, we find the following factual situation before us. On May 31, 1972, plaintiff, a citizen of New Zealand, entered the United States from Canada on a B-2 visa.[1] On

[1] 8 C.F.R. § 214.2(b) (1973).

June 24, 1972 plaintiff and two companions departed from the United States to Canada by way of Vermont but were refused entry into Canada by Canadian officials. As a result, plaintiff returned to the United States where he was stopped by U. S. Customs officials at Derby, Vermont. A suitcase containing approximately $310,000[2] was found in the engine compartment of the automobile and plaintiff, his companions and the money were detained at the border. On the same day, Fulton Fields, the District Director for IRS in Burlington, Vermont, was advised by customs officials of the above facts and, relying on them, found that plaintiff and those with him were in the process of putting their assets beyond the reach of the Government by removing them from the country thereby tending to prejudice or render ineffectual the collection of the tax. Upon making this finding, Fields terminated the 1972 taxable years of the three individuals and sent two IRS agents, Joseph O'Kane, Chief of the Intelligence Division, IRS, Burlington, Vermont, and James Perry, Assistant Chief of the Collection and Taxpayer Service Division, Internal Revenue Service, Boston, Massachusetts, to the border to take the steps necessary to collect the tax liabilities of these persons. Upon arriving at the border, the IRS agents interviewed plaintiff and his associates and demanded payment of tax from each in the amount of $310,000. Upon their refusal, the agents contacted the IRS Service Center in Andover, Massachusetts, and requested and orally received a tax assessment upon each person in the amount of $310,000. These assessments were communicated orally to the plaintiff by the IRS agents and after a second refusal, the sum of $306,896.50 was seized from the suitcase and applied to the tax liabilities of each person in the car.

[2] According to IRS affidavits, the actual amount seized was $306,896.50, but plaintiff claims he was in possession of $310,000.

On June 29, 1972, Edward Gallagher, Acting Director of IRS in Burlington, Vermont, sent plaintiff a written declaration made pursuant to 26 U.S.C. § 6851[3] that plaintiff was placing his assets beyond the reach of the Government and thus his taxable year 1972 was terminated and a tax of $195,985.55 for the period from January 1, 1972 to June 24, 1972 was assessed and made payable. This letter was sent to the address plaintiff gave U.S. Customs officials but it was returned to IRS "addressee unknown—no such street and number."

The plethora of theories relied upon by plaintiff can be reduced to three major contentions:

1). That the procedures employed by the IRS summarily deprived plaintiff of his property without a hearing in contravention of the Fifth Amendment to the United States Constitution;

[3] 26 U.S.C. § 6851(a)(1) provides that:

(a) *Income tax in jeopardy.*—

(1) *In general.*—If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.

2). The IRS's assessment of tax and levy of plaintiff's money was not in conformity with the applicable sections of the Internal Revenue Code and thus injunctive relief is warranted.

3). Assuming the IRS properly followed the Code, it acted arbitrarily and capriciously in seizing plaintiff's money.

Plaintiff's effort to obtain declaratory relief in this action must fail because the plain wording of the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, specifically excludes controversies concerning federal taxes. Thus, questions involving federal taxes may not be considered under the declaratory judgment section and the federal courts are without jurisdiction to enter declaratory judgments in such cases. United States v. Teitelbaum, 342 F.2d 672 (7th Cir. 1965), cert. denied, 382 U.S. 831, 86 S. Ct. 71, 15 L.Ed.2d 75 (1965); Standard Oil Co. (N.J.) v. McMahon, 139 F.Supp. 690 (S.D. N.Y.1956), aff'd, 244 F.2d 11 (2d Cir. 1956).

It is also settled beyond controversy that summary attachment for the collection of internal revenue is constitutionally permissible and does not run afoul of the procedural requirements of due process. Thus, no hearing was required before plaintiff's property was seized. Phillips v. Commissioner, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (1931); Parrish v. Daly, 350 F.Supp. 735 (S.D.Ind.1972). The holding in Phillips v. Commissioner, *supra*, was recently reaffirmed in Fuentes v. Shevin, 407 U.S. 67, 91-92, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

Plaintiff's constitutional and declaratory judgment contentions being fruitless, his case must rise or fall solely on the provisions of the Internal Revenue Code. In seeking to restrain the assessment or collection of a tax, plaintiff must come within one of the narrow exceptions to the anti-injunction provisions of 26 U.S.C. § 7421(a). Plaintiff contends that the exception to the broad anti-injunction provisions of Section 7421(a) contained in 26 U.S.C. § 6213(a) places restrictions on deficiency assessments and plaintiff argues that section 6213(a) prohibits immediate levies with no waiting period for the collection of tax except as provided in 26 U.S.C. § 6861.[4] Accordingly, plaintiff contends IRS was forced to proceed under section 6861 and, since the IRS never sent plaintiff a deficiency notice as provided in section 6861, the IRS did not follow the legislatively mandated procedures and thus injunctive relief can be had under section 7421(a).

The Government argues that since it proceeded under 26 U.S.C. § 6851 the procedures required in section 6861 are irrelevant, the section 6213(a) exception to the anti-injunction statute is inapposite and therefore plaintiff's action must be dismissed.

The threshold inquiry therefore becomes whether section 6851 or section 6861 is applicable to this controversy. Section 6851 provides for the termination of a taxable year and demand for an immediate payment of tax where jeopardy, i. e. prejudice against collection. is deemed present by IRS. In contrast, section 6861 provides for the jeopardy assessment of a deficiency in tax as defined by 26 U.S.C. § 6211(a). Generally, a deficiency is defined by section 6211(a) as the amount by which the tax imposed by statute exceeds the amount of tax shown on a taxpayer's return. By definition then, such a deficiency could not be determined until a return

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[4] 26 U.S.C. § 6861(a) provides that:

(a) *Authority for Making.*—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

for a taxpayer's full taxable period has been filed or until the due date for filing such a return has expired. In this case, there was no return filed by the taxpayer and so there could be no deficiency. Since there was no deficiency there could be no deficiency assessment and consequently section 6861 cannot apply in this case.

Irving v. Gray, 479 F.2d 20 (2nd Cir. 1973) holds that section 6861 and section 6213(a) do not apply in the case of a jeopardy assessment made in respect to a departing or concealing taxpayer assessed under section 6851.[5] *See also* Williamson v. United States, No. 17992 (7th Cir. filed April 8, 1971); Parrish v. Daly, *supra*.

Plaintiff contends that *Irving* is not binding precedent because in that case there was no attack on the procedure used by IRS nor was there any question of the arbitrariness of the IRS's determination that a jeopardy assessment should be made.

With regard to plaintiff's first profferred distinction, we note the similarity of the chronology of the IRS's action in this case and in *Irving*, both of which in our opinion satisfy the provision of 26 U.S.C. § 6331(a), the general levy and distraint provisions of the Code.[6] Since we have previously determined that the summary assessment and levy procedure is not constitutionally impermissible, we reject plaintiff's argument that the procedures employed by the Government in this case were improper.[7]

[5] Section 6851 does not contain its own assessment authority but, contrary to plaintiff's contention, this section derives its assessment authority from 26 U.S.C. § 6201. Irving v. Gray, *supra*.

[6] Although *Irving* involved a written termination of the taxable year, notice of levy and assessment of tax, we do not believe the oral effectuation of these procedures is improper. Section 6851 does not, by its terms, require a writing and neither 26 U.S.C. § 6303 (notice and demand for tax) nor 26 U.S.C. § 6155 (payment on notice and demand) require a writing. Also, the levy and distraint provisions of section 6331 permit a levy to be made by giving notice in person. *See* United States v. Oliver, 421 F.2d 1034 (10th Cir. 1970) and United States v. Bernstein, 287 F.Supp. 84 (S.D.Fla.1968) which hold that property levied upon and seized under section 6331 need not be accomplished by written notice, actual notice and demand are sufficient. Finally, we perceive that the nature of the jeopardy proceeding under section 6851 is not suited to the cumbersome requirements of written notice, *cf.* Irving v. Gray, *supra* ("Section 6851 was enacted to allow IRS to prevent taxpayers from fleeing the country with taxable funds. . . . Under such circumstances, Congress has given IRS a little leeway to protect the revenues.")

[7] We also note that even though the chronology in Williamson v. United States, *supra*, does not follow section 6331 the court refused to restrain the collection and assessment of the tax.

We also reject plaintiff's challenge to the arbitrariness of the IRS's determination that there was jeopardy against the collection of these taxes which justified the termination of the taxable year. Plaintiff, relying upon Lucia v. United States, 474 F.2d 565 (5th Cir. 1973) and Pizzarello v. United States, 408 F.2d 579 (2d Cir. 1969), contends that the Government must have some basis in fact for the seizure and absent proof of this, no assessment can be made. *Lucia* and *Pizzarello* are patently distinguishable from this case because they do not involve jeopardy assessments under section 6851 but rather assessments under 26 U.S.C. § 6862(a) for unpaid wagering taxes.

The distinction is crucial because, unlike section 6862(a), section 6851(a) provides that the finding of the secretary or his delegate that jeopardy is present is presumptive evidence of jeopardy. Thus, where the IRS, in the interest of collecting revenue, proceeds by proper steps under section 6851, its determination of the facts and their sufficiency to warrant resort to peremptory collection are not to be reviewed in injunction proceedings. United States v. Bonaguro, 294 F.Supp. 750, 753 (E.D.N.Y.1968), aff'd sub

nom. United States v. Dono, 428 F.2d 204 (2d Cir. 1970), cert. denied, 400 U.S. 829, 91 S.Ct. 57, 27 L.Ed.2d 59 (1970). *See also* Transport Mfg. and Equipment Co. of Del. v. Trainor, 382 F.2d 793 (8th Cir. 1967); Clark v. Campbell, 341 F.Supp. 171 (N.D.Tex,1972). In this connection plaintiff does not attack the veracity of the affidavits filed by the Government describing the procedures employed in the assessment and levy but contends that they do not go far enough because they do not elucidate the factual basis for the Government's jeopardy determination under section 6851 which necessarily concludes that plaintiff was a person liable to pay tax. We disagree. This proceeding is not a proper vehicle for this challenge and we conclude that the affidavits are sufficiently explicit to enable the court to determine without doubt that the Government's procedures were proper and adequate. We determine that further exploration of the IRS's motivation for the assessment would not affect our decision concerning jurisdiction and is thus not relevant to any of the issues before the court in this particular proceeding. We therefore grant defendant's motion for a protective order barring the taking of depositions of the IRS officials noticed by plaintiff.

From what we have said, it is apparent that the judicially created doctrine announced in Enochs v. Williams Packing Co., 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962) is inapplicable because it is far from clear that "under no circumstances could the Government ultimately prevail" in this case.

In light of the foregoing we grant the Government's motion to dismiss but we do point out that this decision does not foreclose plaintiff's opportunity for redress in subsequent proceedings presented to the court in a proper jurisdictional and procedural posture.

Appendix C.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES BURNETT McKAY LAING

v.

UNITED STATES OF AMERICA ET AL.

N. 707, Docket 73-2537

[496 F.2d 853 (2d Cir. 1974)]

PER CURIAM:

Plaintiff appeals from the judgment of the district court dismissing plaintiff's complaint, which sought an injunction against the continued possession by the Internal Revenue Service of money allegedly belonging to him and a declaratory judgment that the provisions of the Internal Revenue Code under which the assessment and levy on his property were made were unconstitutional. The facts are set out in the opinion of the district judge, 364 F.Supp. 469, at 470, 471, and are not disputed.

On appeal plaintiff argues: (1) that the Government cannot assess a taxpayer's tax liability pursuant to 26 U.S.C. § 6201 unless or until the taxpayer, or the the Secretary or his delegate on bahalf of the taxpayer, files a tax return; (2) that the IRS cannot terminate a taxable year and make a jeopardy assessment under § 6851, but must proceed under § 6861; (3) that the assessment and seizure in the instant case constituted a denial of due process, and (4) that the district court was not without jurisdiction to grant relief. In effect, plaintiff is asking the Court to reconsider and overrule Irving v. Gray. 479 F.2d 20 (2 Cir. 1973).

We affirm the dismissal of the complaint. Notwithstanding the recent decision of the Sixth Circuit in Rambo v. United States, 492 F.2d 1060 (1974), we adhere to our decision in *Irving*, which discussed and declined to follow the decisions upon which *Rambo* was largely based, particularly Schreck v. United States, 301 F.Supp. 1265 (D.Md.1969). See 479 F.2d at 23, 24. The facts and applicable principles in the instant case are essentially similar to those in *Irving*. Plaintiff was attempting to take some $300,000 in cash out of this country in a suitcase in the engine compartment of his automobile. A jeopardy assessment was clearly justified. So far as the record shows, no deficiency has yet been determined and plaintiff therefore has not yet had access to the Tax Court. But he has had the right, at any time, to file a return showing the amount of any tax due and to file an action in the appropriate district court six months thereafter to recover any claimed overpayment as a result of the jeopardy assessment and seizure of his money. Int.Rev. Code of 1954, §§ 7422(a) and 6532(a); T.R. § 301.604-3(b) (1958); Irving v. Gray, 479 F.2d at 24.

Actions to restrain the assessment or collection of federal taxes are generally barred by § 7421. This case does not fall within any of the exceptions enumerated in that section; nor does it fall within the exception created by Enochs v. Williams Packing Co., 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962), i. e., where (1) "it is clear that under no circumstances could the Government ultimately prevail" and (2) "equity jurisdiction otherwise exists". See Irving v. Gray, 479 F.2d at 25.

Affirmed.

Appendix D.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of May one thousand nine hundred and seventy-four.

Present: HON. HENRY J. FRIENDLY
HON. WILLIAM H. TIMBERS
Circuit Judges
HON. ROSZEL C. THOMSEN
District Judge

JAMES BURNETT McKAY LAING
v. 73-2537
UNITED STATES OF AMERICA ET AL.

Appeal from the United States District Court for the District of Vermont.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk,
By VINCENT A. CARLIN,
Chief Deputy Clerk.

Appendix E.

[36] MR. WEINBERG: Mr. Fields.

FULTON D. FIELDS, having been called as a witness, was duly sworn by the Clerk and testified on his oath, as follows:

CROSS EXAMINATION BY MR. WEINBERG:

Q. Mr. Fields, tell the Court your name and address? A. Fulton D. Fields, Burlington, Vermont.

Q. You are presently employed as the District Director of the Internal Revenue for the State of Vermont? A. Yes.

Q. And you were so employed on June 24, 1972? A. Yes.

Q. You made an affidavit out which I now show you, is that correct? A. (No response).

Q. I am going to ask you some questions from the affidavit. A. Good.

Q. Do you have a copy of it? A. Yes, I do.

Q. In paragraph 2, you said that you received certain information [37] by an agent of the Bureau of Customs in Derby Line, Vermont, who is that agent? A. An agent by the name of CURTIS.

Q. Mr. CURTIS?, A. Yes.

Q. And where were you when you received this information? A. At home.

Q. Was this a phone conversation. A. Yes.

Q. And, could you tell us the substance of that conversation? A. Yes, he called me early one morning, Saturday morning, and he told me that they had turned back to them three individuals who had tried to enter Canada during the night and when they came back into Customs, they located a sum of money and I asked him how long they could hold them, if there was money involved, and was their tax paid

on it, and he said they could hold them for two hours or if you would send someone up here, we will hold them until they arrive.

Q. And would you determine they were placing their assets beyond read [*sic*] of the Government by concealing or removing the assets from the United States, that was the sole information upon which you relied? A. Give me that again, please?

[38] Q. You have no personal knowledge of whether or not Mr. LAING and other people in his car were planning on taking the assets of this country, out of the country, did you? A. I had no knowledge prior to that conversation.

Q. You were back in Vermont, right? A. right.

Q. And the only knowledge you had before making the determinations alleged in the paragraph 3 of your Affidavit, were those,—that information coming to you from a phone call by Larry CURTIS? A. Right, they had tried to enter Canada, and were returned by the Canadian Government and they found the cash at that time and particularly, since it was in the hood or under the hood of the car.

Q. Did Mr. CURTIS tell you whether or not these were citizens of America, or aliens? A. I don't believe that he did. I don't know,—I don't remember, at this point.

Q. Did you ask him any questions about whether or not these were businessmen, or whether or not, or what these people looked like, or who these people were? A. No.

MR. MULLENHOLZ: Your Honor, I object to these questions, I think they are outside of the scope of the affidavit.

[39] MR. WEINBERG: Your Honor, the jurisdictional question here is whether there's any basis for the finding of jeopardy, I think I have a right on the jurisdictional question to go into what made Mr. Fields decide that the money was in jeopardy.

MR. MULLENHOLZ: Your Honor, I argue strenuously against that. There is no opportunity here for the Court, or for the, I'm sorry, for the plaintiff to challenge his determination as to whether or not there was a jeopardy situation. The question is, did he determine that there was a jeopardy situation, not the basis for his determination.

THE COURT: Yes, the Court agrees and the Court believes that at this stage, the question should be confined as to whether or not, having made the determination, the Government acted procedurally in a correct manner.

MR. WEINBERG: So, if I can speak to that, I cannot go into the reasons behind the determination, the determination is just being taken as a fact, Your Honor?

THE COURT: You can go into the facts only as alleged in the affidavit. And, whether or not the Government acted, or how the Government acted, but not the reasons for the act, as long as it was . . . (Interrupted).

MR. WEINBERG: Did,—did Mr. CURTIS tell you why they weren't admitted in to Canada? [40] A. No.

Q. So, on the basis of that phone conversation, which took how long? A. I would say maybe ten minutes.

Q. You found that these people were in the process of placing thier assets beyond the reach of the Government, is that correct? A. In my opinion.

Q. Was this a mental finding? A. What other way would I have? They tried to enter Canada with this much money.

Q. Did you write it down? A. What do you mean?

Q. When you made this finding, did you make any administrative steps to implement it in terms of writing? A. Well, I . . . (Simultaneous voices)

Q. I—

MR. MULLENHOLZ: Object, Your Honor, I think that the only question is whether or not he made that finding, he has so stated what he did with the information as

set forth in the affidavit. I mean, the fact that he made the determination, and I don't think it is that question of whether he wrote it down or put it on a pad, or what he did,—he made the determination, and that is all the staute requires.

[41] THE COURT: Well, how do you consider it relevant as to whether it was a written determination, or a determination which he made in a discretionary capacity?

MR. WEINBERG: One of my contentions is that improper procedures were followed and I speak to raise the issue with Your Honor, and I think the issue is unclear from the regulations, and from the statutes as to what mechanism,—what is this finding? Is this just a mental finding by the District Director, or is this just some sort of a standard, or after making the finding, is there some consequences to the findings the District Director must pursue, to make the findings legitimately? He can keep it in his head forever and doesn't have to do anything with it, or does he have to put it down on any sort of reports?

THE COURT: No, I think this was an immediate determination, which he was obliged to make and did make, and what he may have done after that, I think might be proper, but at that particular time, in strict fidulity(?), to think that he would make any written finding of any . . . (interrupted) . . . permanent nature . . . (Simultaneous voices).

MR. WEINBERG: Once having made the finding, . . . when you made the finding, were you still on the phone with Mr. CURTIS? A. I don't know just what you mean by "When you made the [42] "finding," I made a determination.

Q. Yes, when you determined that this money was in jeopardy, that is the finding you made, correct? A. When I determined that they were trying to remove this money from the United States, that is when I made the decision.

Q. When was that? A. Immediately.

Q. On the phone? A. On the phone.

Q. Did you communicate the finding to anyone? A. Yes.

Q. Who,—to who? A. To our Chief of Intelligence.

Q. Who is that? A. Joseph O'Kane.

Q. So, you made a subsequent phone call to Mr. O'Kane? A. Right.

Q. Where was he at the time? A. He was at his home.

Q. And what did you tell him, in substance, if you recall? A. I tried to repeat the information received from Agent CURTIS and told him that I wanted us to cover that money, if,—legitimately to set up the assessment, but [43] that he is our Intelligence Chief and since Mr. PERRY lived very close to him at that time, to contact him and proceed to Derby Line where this had taken place and to take whatever steps were necessary.

Q. And, what steps did you consider necessary to make a proper conclusion to this matter, once you had made a finding there was jeopardy?

MR. MULLENHOLZ: Your Honor. I think he stated that he told the Chief of Intelligence to tell Mr. PERRY to take whatever steps were necessary to . . .

THE COURT: May I have that question again? (Question read by reporter)

THE COURT: Well, I think basically, that probably is a conclusion for the Court to draw, but . . .

MR. WEINBERG: I was just asking the District Director's opinion on just what procedures should be followed at this time. What I'm trying to determine whether the District . . . (Simultaneous voices)

THE COURT: I think you should confine yourself, Mr. Weinberg, as to what he did at that particular time.

MR. WEINBERG: The purpose of the question, Your Honor, is that someone made a determination this should be a 6851 proceeding. I want to make . . . I want to know

who made the determination, it—I want to know whether Mr. FIELDS [44] told Mr. O'KEEFE (sic), that that was the way to do it, or whether Mr. FIELDS,—the opinions on this matter are perhaps, circumvented.

THE COURT: Well, I don't know that I understand the line of inquiry. I would like you to determine from the witness only what he did on the factual basis and, not what the conclusions that he may have drawn, in,—as a matter of law. That is for the Court's determination.

MR. WEINBERG: I will try to stay close to that line, Your Honor.

Examination Resumed By Mr. Weinberg:

Q. When you talked to Mr. O'KEEFE, after you told him the facts which were related to you by Mr. CURTIS, did you tell him anything specific as to what steps to take? A. No, we have set procedures and I knew that our men knew what to do and that's what I wanted them to do.

Q. Are those procedures in writing? A. They are.

Q. Are they in the United States Code of Regulations? A. I don't know what the Code they are in,—the Internal Revenue,—our Manual calls for the steps which we take and we follow them.

Q. So, you didn't tell Mr. O'KEEFE whether to follow jeopardy procedures, or whether to follow the 6851 procedures, [45] is that correct? A. That's true, because I didn't know the details, when these gentlemen get on the scene, they use their judgment.

MR. MULLENHOLZ: Your Honor, I am going to raise an objection on this ground. Mr. Weinberg is confusing this basic issue when he is talking about a jeopardy situation, or a 6851 situation. The District Director has already stated that he determined that the taxable year should be determined. That is the determination under 6851 that is the determination he made. So that I think the questions, where the District Director is being asked whether he determined 6851 or a jeopardy situation are serving merely to confuse the issues and confuse the District Director,—he made a 6851 Decision under that statute to determine the taxable year and so that I think Mr. Weinberg should phrase his questions as the statutes lie.

MR. WEINBERG: The United States against SCHRECK case says, Your Honor, once you determine the taxable year, then you may go into 6851. I don't think it's by any means clear.

THE COURT: Well, the relevance of these questions, I believe, will probably also have to be determined by the Court at the appropriate time. As we indicated earlier, we are not satisfied that we actually know what these particular [46] statutes or sections of the statutes hold, and how they applied at this particular time, and we figure we are operating under somewhat of a handicap. The reason for having the inquiry at this time, is to see if we can further this proceeding, because the gentlemen are present and save them some later inconvenience.

MR. WEINBERG: Then let me try to avoid legal issues and stick to the affidavit, Your Honor.

Examination Resumed By Mr. Weinberg:

Q. When did you determine the taxable years were terminated, is that when you determined there was jeopardy?

MR. MULLENHOLZ: Your Honor, that question . . . (Simultaneous voices) A. You're,—you're,—you're . . . (Simultaneous voices).

MR. MULLENHOLZ: I object to it.

MR. WEINBERG: I have only gone in to what he determined jeopardy, Your Honor.

A. I made no determination, whether there was jeopardy, or which section it would fall under. At this point, I couldn't tell, but I knew that my men who would be on the scene, would be in a position and have the knowledge to take whatever steps were necessary.

Q. And you say that "I found that these people were in the process of placing their assets beyond the reach of the Government and I determined that the taxable years were" [47] terminated." Did you do that both at the same time on the phone with Mr. CURTIS? A. Yes.

Q Okay. No more questions.

THE COURT: Any questions, Mr. Mullenholz?

MR. MULLENHOLZ: No, Your Honor.

(The witness having been excused, withdrew from the stand.)

JAMES R. PERRY, having been called as a witness was duly sworn by the Clerk and testified on his oath as follows:

EXAMINATION BY MR. WEINBERG:

Q. Tell the Court your name and address, Mr. Perry? A. James R. PERRY, 308 "Stimersvale"? Road, Waltham, Mass.

Q. What is your present occupation? A. Assistant Chief of Collections. Tax Payer Service Division, Boston District.

Q. What was your position back in June 24, 1972? A. Chief Collections, Tax Payer Service Division, Burlington, Vermont District.

Q. When were you first apprised of this matter? A. Saturday morning, June 24.

Q. Where were you? A. At my home on Grand Isle.

Q. And who apprised you of it? A. Joseph O'KANE, Chief of Intelligence Division, [48] Burlington District.

Q. And did you and Mr. O'KANE subsequently go to Derby Line? A. Right, he picked me up.

Q. What was the substance of the conversation he had with you on this morning? A. That the Customs had detained three people who had been turned back by the Canadian authorities early that morning, for failure to provide adequate identification on the return to the United States or local immigration people through conventional routine

search of the vehicle, discovered a large sum of cash hidden under the hood, between the engine and the fire wall. That was the extent of the knowledge that we had from Customs. Procedures are currently in existence, and were in existence then, relative to the administrative procedures used by I.R.S. to determined the, if the assessment, to determine if the assets are being removed from the country, if there is any additional tax and this was the extent of our conversation. Get the facts and make a determination whether we would proceed with our assessment.

Q. Did he communicate to you any directions from Mr. FIELDS? A. Specific directions, relative to that case?

Q. Yeah. [49] A. The general directions had . . . procedures were in existence. Mr. FIELDS' concern was to protect the revenue.

Q. Did Mr. O'KANE tell you Mr. FIELDS said the taxable years of these people were terminated? A. Well, it's sort of a foregone conclusion. Whether we made specific mention of it or not, we wouldn't . . . (interrupted) . . . have gone there, if we . . .(interrupted) didn't have that idea in mind.

Q. Did Mr. O'KANE tell you Mr. FIELDS made a finding that these funds in the trunk were in the process of being sent out of the country? A. I don't recall, no, sir.

Q. In your affidavit you say that Mr. FIELDS had directed that all necessary steps be taken to collect the tax liability of these three individuals? A. That's right.

Q. Who communicated to you, that there was any liability? A. Well, this was part of my responsibility, as Chief Collections Division within Vermont and all tax cases relative to all collection matters were within my jurisdiction. That was an on-going routine thing, so it didn't require specific instructions from the District Director that morning.

Q. So you say, "I was advised by Mr. O'Kane that Fulton FIELDS [50] had directed that all necessary steps be taken to collect the tax LIABILITIES OF THESE INDIVIDUALS"? A. Right, that was my responsibility, he directed me to report to Derby Line and determine the facts in this particular case.

Q. Before you entered Derby Line, had there been a determination that a tax liability was, in fact, present for these individuals? A. There was a sufficient basis there for me to go to Derby Line to determine if the taxable year should be terminated.

Q. You had an interview with Mr. LAING, Mr. KLEINHANS, and Miss REED, is that correct? A. Yes.

Q. Mr. KLEINHANS and Miss Reed, denied any possessory interest in that money, didn't they?

MR. MULLENHOLZ: Your Honor, I object to this, it is outside the scope of the affidavit. The only purpose here is to determine what steps were taken.

THE COURT: I agree. We'll exclude that question.

Q. During the interview, what was the purpose of the interview? A. To determine the nature of the income, the owner of the money.

[51] Q. And you had conversations with Mr. LAING and the other people? A. That's right.

Q. And your purpose was to try to determine whether that was an American taxable income?

MR. MULLENHOLZ: Your Honor, I object again, we are only interested in facts here, we are not trying to go into ..... (Interrupted)

MR. WEINBERG: I withdraw the question.

Q. Right after completing the interview, you say that you gave notice to Mr. LAING because they were attempting to put their assets out of reach, the taxable years had been terminated, was this notice in writing? A. No, it was an oral notice.

Q. It was an oral notice? A. Right, and witnessed by an Internal Revenue Agent.

Q. By the name of? A. Ralph D. MARTIN.

Q. And, what did you basically tell them? A. What did I basically tell them?

Q. What did you tell Mr. LAING when you say, "I gave him notice"? A. That his taxable year had been terminated as of June 24th and we were going to effect an assessment by [52] notifying our ANDOVER Service Center of approximately $310,000.00.

Q. Against each of them? A. You asked what I said to Mr. LAING. That's exactly what I said to Mr. LAING, — something relative to that termination and the amount of the assessment.

Q. Well, you had determined at this time, you were going to assess each of them $310,000.00, correct? A. That was the function of the outcome of the interviews. Right, and you arrived at the conclusion that they should be assessed $310,000.00, because that was the exact amount found in their car, correct?

MR. MULLENHOLZ: I object again. We are only asking what was done, not the basis for his determination. He's asking him again for a conclusion.

MR. WEINBERG: Your Honor, one of the three oppositions to the Motion To Dismiss, is the allegation under the ENOCHS case that the Government can use the words, "Used bad faith," in making these assessments, but they assessed these people $930,000.00, without an iota of information that this money was owed to the United States.

THE COURT: Well, Mr. Weinberg, let's confine our inquiry at the, at this time, to what was done and if later, to the Court appears germaine, or upon appropriate [53] motion to that effect, we can go into this further inquiry, but, at this time, I am only interested in what was, in fact, done and what the procedures were, — what procedures were that were followed.

MR. WEINBERG: Okay.

Examination Resumed By Mr. Weinberg:

Q. You demanded immediate payment of their tax liabilities in the amount of $310,000.00, correct? A. That's correct.

Q. And that was on oral demand? A. Yes.

Q. It was subsequent to giving oral notice that their taxable years had been terminated? A. Right.

Q. And when you made this demand, — I withdraw that. This demand was made before an assessment was made, correct? A. Yes, the — the — we had not received the confirmation that the assessment had been placed on the assessment list, but we .... (Interrupted).

Q. Had you contacted ANDOVER before making the demand? A. Yes.

Q. See if paragraph 6 is helpful in that, Mr. Perry. (Document handed the witness by counsel). A. (Reading silently) ..... Helpful in what respect?

[54] Q. Is it fair to say you demanded the money before you had contacted ANDOVER and asked them to go through the procedures to make an assessment? A. I contacted ANDOVER three or four times. We have several people to contact and I started off with the Director of the Service Center, so, at what point in time the assessment was actually made, I don't know, but it is really superfluous, because we knew that the assessment was going to be placed on the books as of June 24th, so at what point in time, it didn't really matter. Also, we did not, — we had sufficient information to determine that there — that there was taxable income with regard to one of, — or all three of these people.

MR. WEINBERG: May I go into that, Your Honor, the last sentence that "we had sufficient information to determine there was taxable income," or would that be beyond the purview of this examination?

THE COURT: Well, we'll take a limited inquiry into this aspect, then.

Q. What information did you have, in support of that last statement that you had sufficient information to determine that there was taxable income in . . (interrupted . . America? [55] A. Let's just deal with the facts of the case at this point in time .... (Simultaneous voices)

Q. I want to know what .. (Simultaneous voices) information .. A. What information? $300,000.00 cash. In a paisley print piece of luggage, hidden between the engine and the fire wall at 2:00 a.m. in the morning, attempting to cross into Canada, is sufficient information for me to seek further information relative to where it came from.

Q. To make an assessment? A. Certainly.

Q. And that was the information upon which you relied in making your assessment? A. That's part of the information.

Q. What other parts were there?

MR. MULLENHOLZ: Your Honor, I object. We are getting into this issue again; — we are beyond the scope of what was done. We are getting into the basis of the determination and I think that the issue to be determined is whether the Internal Revenue Service followed the procedures and not what the basis for its determination was. The question of what the proper basis is, or what the tax liability is in this situation, is properly to be handled in refund case, not in this type of situation. The only question here is whether or not the [56] Internal Revenue Service followed its procedures in seizing this money and that is the issue which I thought Your Honor had confined the examination to and not get into all of the ramifications and all the information which went behind the determination.

MR. WEINBERG: Surely, Your Honor, implicit in the procedures is something that says you can't make arbitrary assessments.

THE COURT: Well, at this particular time, I think you are now getting into the merits of your case. At this particular time, I am interested, primarily, in the procedures which were employed. Now, if later and after we get your additional memorandum, we get your itemization of procedures which were followed and we can put them in some orderly context, it may be in order for you to get into this particular area in connection with the Motion to Dismiss and for Summary Judgment, but at this particular time, I ask you to confine your inquiry only to what was actually done and not the reasons lying behind the procedures which were adopted.

Q. You contacted ANDOVER Service Center and requested the assessment be made? A. That's right.

Q. Have you ever seen the formal recording of assessment of Mr. LAING?

[57] MR. MULLENHOLZ: Objection, Your Honor.

MR. WEINBERG: Your Honor, the procedures say that assessments have got to be filed in this specific recording manner, and I just want to know whether this man has the first-hand knowledge, to know whether those procedures were followed in this case.

THE COURT: I think that is fair, too. We'll take the answer. A. Yes, that's so.

Q. You went to ANDOVER and saw them? A. No, they were mailed to the Burlington office subsequently.

Q. Copies of it? A. Right.

Q. Or, was the original notice .... (Simultaneous voices) A. The original notice was then mailed out to your client.

Q. At what address? A. Last known address that they gave Customs officials.

Q. Who was . . . (Simultaneously voices) . . . A. Together with the receipts for the money.

Q. With, — they were mailed with the receipts for the money? A. Not in the same envelope, but, both of those documents were mailed to .... (Interrupted) ..

Q. About how long after June 24th, were they mailed? [58] A. I don't know.

Q. So, you have other copies? A. I don't believe ... (Simultaneous voices)

MR. MULLENHOLZ: Your Honor, I object. A. I have five thousand other cases, so I don't recall at what point in time the notices were made.

Q. As part of the procedures to mail the assessments to the tax payers? A. As part of the procedures to ... (Interrupted) ...

Q. Is that a .... (Simultaneous voices)

MR. MULLENHOLZ: Your Honor, again .. (SV)

THE COURT: Just a minute. I didn't rule on the previous objection. Well, Mr. Weinberg, I think we are getting pretty far afield. I am having difficulty at this point, drawing a distinction between the merits of your case and what would be apropos for the termination of the defendant's motion. I just want, again, just what was done at this stage in time .... (Interrupted again)

MR. WEINBERG: Okay.

THE COURT: .... and later on, if it becomes significant, you can, we can go into it. in further detail.

MR. WEINBERG: Your Honor, I am just trying to confine myself to .... (Simultaneous voices) .. what happened ...

THE COURT: Just what he did .. (Simul. vcs) [59] A. To the assessment?

THE COURT: Well, just ask him what he did. ... (interrupted) and not the reasons for doing it.

Q. When did you receive the assessment from ANDOVER, if you know? A. I don't know.

Q. Now, you saw the assessment? A. The written assessment?

Q. You saw it? A. Yes, sir, that was at a subsequent point in time.

Q. What did it contain, if you know?

MR. MULLENHOLZ: Your Honor, I object. This is ... (Simultaneous voices) ... a, ... the affidavit is limited to what was done today, (Simultaneous voices)

MR. WEINBERG: Your Honor, the regulations *compel* specificity in the assessment, and that's one of the grounds that I allege in my opposition to the Motion to Dismiss and in my preliminary injunction.

THE COURT: Well, all right, we are going to terminate this examination at this particular time, in view of the fact that it is not furthering this cause as we had hoped that it would. We do ask that, ... and we will allow you a later opportunity to examine this witness, either by discovery or in the presence of the Court and we would ask, specifically [60] from the Government, that they cite the procedures which were followed in this instance, the authority for these procedures by way of regulation, and the appropriate sections of the statute and the theory of their case, so that we can make an intelligent determination as to the nature of the Government's claim in this instance and we would like those at the same time we have your Memorandum, and you can reply to those allegations in your reply Memorandum. We will then set another hearing as soon as we can at a reasonably convenient time and we may, of our own order, on our own order, have certain areas of inquiry we will want to cover in connection with that particular hearing.